Internal Revenue Service

memorandum

CC:TL-N-3621-89
TS/LJBYUN

date: 11 MAY 1989

to: District Counsel, Sacramento W:SAC
Attn: Alan E. Staines

from: Acting Senior Technician Reviewer
Tax Shelter Branch CC:TL:TS

subject: [redacted]

We have reviewed the attached advisory opinion dated February 8, 1989, issued by your office to Chief, Planning and Special Programs concerning [redacted]. We concur in the conclusion reached that the same share requirement of the small partnership exception has not been violated and that [redacted] is not subject to the TEFRA partnership procedures. We add, however, the following comments.

(1) Proof of Theft:

In order for a taxpayer/partner to get an I.R.C. § 165 theft loss deduction with respect to a loss resulting from the alleged theft of partnership funds by a fellow partner, he must prove that his loss resulted from a taking of property which was illegal under the laws of the state where it took place and that the taking was done with a criminal intent. Rev. Rul. 72-112, 1972-1 C.B. 60. It has been held that theft may be proved even though the thief is not convicted or even prosecuted, where the theft is clearly shown by other evidence. Campbell v. Commissioner, T.C. Memo. 1979-411. In this regard, however, a mere indictment does not prove theft and the absence of a conviction is a factor to be considered which indicates that a theft did not in fact occur. Arcade Realty Co. v. Commissioner, 35 T.C. 256 (1960).

(2) Year of Deduction:

Any loss arising from theft, embezzlement, etc. is deductible only for the taxable year in which the taxpayer discovers such loss, except where taxpayer has a reimbursement claim. Treas. Reg. § 1.165-8(a)(2). Since a partner who embezzles is treated as not being a member of the partnership with respect to the property stolen, Girgis v. Commissioner, T.C. Memo. 1987-556, absent a reimbursement claim, an innocent partner is entitled to an I.R.C. § 165 theft loss deduction due to the theft of partnership property by a fellow partner only in the

taxable year he discovers the theft. Cf. Asphalt Industries Inc. v. Commissioner, 411 F.2d 13 (3d Cir. 1969) (Diversion of corporate income by a stockholder to himself was deductible only by the innocent stockholder in the year the diversion of income was discovered by the innocent stockholder).

Under the facts, the alleged theft was "discovered after the partnership's [redacted] Form 1065 and Schedules K-1 had been filed." Presumably, this means that the theft was discovered in [redacted] or [redacted]. Given this assumption, the theft loss cannot be deducted by the partnership in any year other than [redacted] or [redacted] (further assuming that there was no reimbursement claim). Since the facts indicate that the amendments filed relate to the [redacted] year, such amendments were improperly filed by [redacted]. Therefore, the original Form 1065 and K-1's control for purposes of determining whether the same share requirement has been met.

We also note that the fact that all the "gain" from the alleged theft would be "reaped" by Meamber does not affect the same share analysis since such income is not a partnership item (since it was not stolen by or on behalf of the partnership).

CURTIS G. WILSON

Attachment:
As stated.